

I. Introduction

Over the years, Pac-West's argument has not changed. The ISP-bound VNXX traffic terminated by Pac-West is section §251(b)(5) traffic and thus, under the ISP Amendment to the parties' interconnection agreement, the traffic was properly the subject of compensation from Qwest to Pac-West. Qwest argues that the calls in question are subject to the compensation scheme preserved under §251(g) of the Telecommunications Act.¹ However, Qwest has failed to identify a single pre-Act rule or regulation that provided compensation under §251(g) for ISP-bound VNXX traffic. In fact, no pre-Act rule or regulation proscribed intercarrier compensation for ISP-bound traffic and, consequently, no compensation may be paid under §251(g). It is not enough, even if true, that VNXX traffic is "the functional equivalent of," or "like" a form of traffic which existed pre-Act and was compensated under 251(g). Because VNXX traffic is not 251(g) traffic, Pac-West was properly entitled to compensation under the ISP Amendment at the 251(b)(5) traffic rate of \$0.0007 pursuant to the parties' contract. For this reason, Qwest's challenge to the order requiring compensation should be dismissed.

The August 23, 2010 procedural order requests briefing on three issues: (1) Whether VNXX ISP-bound traffic was subject to reciprocal compensation under Section 251(b)(5) at the time relevant to the dispute arising from the ISP Amendment; (2) if the traffic is not Section 251(b)(5) traffic how VNXX ISP-bound traffic should be categorized for compensation purposes; and (3) whether the appropriate classification can be made solely as a question of law. This brief begins with the third question posed in the procedural order.

¹ 47 U.S.C. § 251(g) (47 U.S.C. § 151 *et seq.* referred to throughout as the "Telecommunications Act" or "the Act").

II. The appropriate classification can be made solely as a question of law.

Very few facts are necessary for the Commission to resolve this legal dispute, and the parties have repeatedly agreed upon those facts over the life of this dispute:

1. The calls at issue were ISP-bound. In this litigation, Qwest has never disputed (nor could it as a practical matter) that these calls were transported to internet service providers.²
2. These calls did not originate and terminate in the same local calling area. Pac-West has not disputed this assertion by Qwest.
3. The calls were locally dialed.

For purposes of this brief only, Pac-West will pretend that it did not have a switch or modem in the Phoenix metro area during the relevant period.³ Also, for purposes of this brief only, Pac-West will agree that the calls in question may have left the local calling area, the Local Access and Transport Area ("LATA") and even the state before they reached the Pac-West owned switch or modem. If, as Pac-West submits, the parties can agree on these three facts, Pac-West does not believe a hearing on the dispute is necessary and, if held, would unduly extend a dispute that has already gone on for five years. The parties generally agree on how the calls were routed and how they were dialed. What is in dispute is how the calls should have been compensated under the Act.

Qwest contends that Pac-West functioned as an interexchange carrier ("IXC") and that these calls were consequently subject to the compensation regime set forth in section 251(g) of the Telecommunications Act. Both assertions are incorrect as matter of law under the law as it existed when the *ISP Amendment* was signed and under current federal law.

² Qwest has contended that the traffic at issue is not "ISP-bound" traffic as that term has been used in the FCC's reciprocal compensation orders. However, we can leave this question open and nonetheless agree that these calls went to an Internet service provider.

³ In fact, during the relevant Pac-West did own and operate a switch in the metro Phoenix area, however, introducing this fact would create an issue of fact that could be disputed. So, we will pretend solely for purposes of this brief that Pac-West did not own a switch.

a. Controlling Law

The Commission is required to apply the most recent, applicable federal law in resolving this dispute. Qwest has historically argued that the doctrines of collateral estoppel and law of the case preclude the Commission from applying the *ISP Mandamus Order*, because the Order was issued after the Arizona district court issued its decision in this case. That argument is incorrect. In *US West Communications, Inc. v. Jennings*, Qwest's predecessor challenged interconnection agreements that had been approved by the Commission.⁴ US West argued that the Ninth Circuit could not apply new FCC regulations that had gone into effect after the agreements had been arbitrated and approved by the Commission and challenged in federal district court, because it would have "an impermissible retroactive effect." The Ninth Circuit rejected US West's assertion, explaining instead that the correct approach is to "ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the ACC approved the agreements."⁵ According to the Ninth Circuit, "the FCC's implementing regulations-including those recently reinstated and those newly promulgated-must be considered part and parcel of the requirements of the [Telecommunications Act of 1996]" and should be applied "to all interconnection agreements arbitrated under the Act, including agreements arbitrated before the rules were reinstated."⁶ The Court further emphasized that such "newly promulgated regulations do not have an impermissible retroactive effect."⁷

US West v. Jennings has been cited repeatedly around the country for the proposition that the courts and commissions are obliged to apply the law as currently declared by the FCC. *See*

⁴ 304 F.3d 950, 965-57 (9th Cir. 2002) ("*US West v. Jennings*").

⁵ *Id.* at 956.

⁶ *Id.* at 957.

⁷ *Id.* at 958.

Pacific Bell v. Pac West Telecomm, Inc., 325 F.3d 1114, 1130 n. 9 (9th Cir. 2003) (citing *US West v. Jennings*) (“all valid implementing regulations in effect . . . including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable” when interconnection agreements are reviewed); *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 394 (7th Cir. 2004) (quoting *US West v. Jennings*) (holding that courts are “obligated” to “apply the law as it currently stands” and that the relevant FCC order currently in effect at the time the court made its decision must be applied, even though the FCC order was issued after the state commission and federal district court had rendered decisions in the matter); *South. New England Telephone v. MCI Worldcom Comm. Inc.*, 353 F.Supp.2d 287, 290, 305 (D. Conn., 2005) (“when reviewing a [commission’s] interpretation of federal law, the court applies the law in effect at the time it conducts its review, even if that was not the law in effect at the time the [commission] made its decision”).

Application of the FCC’s most recent order is not only appropriate; it is compelled by federal law. With respect to this litigation, the FCC did not change its interpretation of the Telecommunications Act of 1996 in the *ISP Mandamus Order*.⁸ Consequently, the Commission is not applying “new law” or reversing course in any way. In the *ISP Mandamus Order* the FCC emphasized that it was in the *ISP Remand Order* that “[t]he Commission reversed course on the scope of section 251(b)(5), finding that . . . the scope of section 251(b)(5) is limited only by section 251(g).”⁹ In the *ISP Mandamus Order* the FCC explained that, consistent with the *ISP Remand Order* “the transport and termination of all telecommunications exchanged with LECs is

⁸ *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, et al.*, CC Docket Nos. 96-45, *et al.*, FCC 08-262, 24 FCC Rcd. 6475, Order on Remand and Report and Order (rel. Nov. 5, 2008) (“*ISP Mandamus Order*”).

⁹ *ISP Mandamus Order* para. 9.

subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)” and “traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent the Commission acts to bring that traffic within its scope.”¹⁰

The most recent applicable development in this case involves the appeal of the *ISP Mandamus Order*. In January of this year, the D.C. Circuit Court of Appeals issued *Core Comm., Inc. v. FCC*,¹¹ upholding the FCC’s analysis in the *ISP Mandamus Order*. In *Core*, the Appeals Court rejected a challenge to the *ISP Mandamus Order* arguing that “because the call to the ISP terminates locally, the FCC’s authority over interstate communications is inapplicable.”¹² The court found that such an argument is inconsistent with the FCC’s end-to-end analysis of calls destined for the Internet and concluded, “Given that ISP-bound traffic lies at the intersection of the § 201 and §§ 251-252 regime, it has no significance for the FCC’s § 201 jurisdiction over interstate communications that these telecommunications might be deemed to ‘terminat[e]’ at a LEC for purposes of § 251(b)(5).”¹³ As such, the court upheld the *ISP Mandamus Order*’s conclusion “that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.”¹⁴ The *Core* decision represents the federal courts’ blessing of the FCC’s rationale in its *ISP Mandamus Order* for establishing the reciprocal compensation rate for all ISP-bound traffic in the *ISP*

¹⁰ *ISP Mandamus Order* para. 16. (“LEC” is local exchange carrier.)

¹¹ 592 F.3d 139 (D.C. Cir. 2010).

¹² 592 F.3d at 144.

¹³ *Id.* Qwest’s argument regarding the historic scope of the FCC *ISP Remand Order* (local only) does not fit with the court’s explanation “that these telecommunications **might be** deemed to ‘terminat[e]’ at a LEC.” If Qwest were correct – and the *ISP Remand Order* dealt solely with traffic that originated and terminated in the same local calling area – one would expect the sentence to read “telecommunications that terminate at a LEC.”

¹⁴ *ISP Mandamus Order* ¶ 8.

Remand Order.¹⁵ That rationale, as Pac-West has previously explained, necessarily means that “ISP-bound traffic” as the *ISP Remand Order* uses that term includes all traffic, even traffic bound for ISPs that obtain VNXX service from Pac-West. The *ISP Mandamus Order* and the *Core* decision clarify that Section 251(b)(5) governs intercarrier compensation for traffic bound for ISPs, regardless of whether those ISPs are physically located within the same local calling area as the calling party. Section 251(g) does not exclude *any* such traffic because there was no pre-Act access obligation for intercarrier compensation for *any* traffic bound for ISPs, including ISPs who subscribe to VNXX service.¹⁶ The *Core* decision is consistent with the D.C. Circuit’s prior findings that the Section 251(g) carve-out by its plain language cannot be extended to services provided by one local exchange carrier (“LEC”) to another LEC, such as VNXX traffic termination: “LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”¹⁷

The *ISP Mandamus Order*, now affirmed by *Core*, is an authoritative interpretation of the Act by the federal agency charged with enforcing the Act and thus supersedes the Arizona district court’s decision and is binding on the Commission. *Auer v. Robbins*, 519 U.S. 451, 461 (1997) (When an administrative agency interprets its own regulation, that interpretation is controlling.). It bears remembering that the Arizona district court judge did not have the benefit

¹⁵ The court upheld the FCC’s *ISP Mandamus Order* in its entirety. As such, the Commission should be leery of any reading of the *Core* order that runs contrary to the *ISP Mandamus Order* itself.

¹⁶ See discussion *infra* at III(a).

¹⁷ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). See also *Pac-West Motion for Summary Determination* at 7-8. The *WorldCom* court is referring to section 251(g) itself, which provides in relevant part that “each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access *to interexchange carriers and information service providers . . .*” 47 U.S.C. §251(g) (emphasis added).

of the *ISP Mandamus Order* and the affirming *Core* decision when she issued her order in March of 2008.¹⁸ Because the *ISP Mandamus Order* makes clear that all telecommunications traffic is §251(b)(5) traffic unless carved out by §251(g), to prevail in this case Qwest must establish, as a matter of law, that this traffic qualifies as §251(g) traffic. As discussed in section III(a) below, Qwest cannot establish that VNXX ISP-bound traffic qualifies for compensation under section §251(g).

b. The Procedural Background

On July 13, 2005, Pac-West filed a formal complaint with the Commission, seeking an order compelling Qwest to pay Pac-West for all locally dialed ISP-bound traffic, as required by the parties' Interconnection Agreement ("ICA"). Pac-West and Qwest had entered into an amendment to their existing ICA (the "*ISP Amendment*") on May 24, 2002.¹⁹ This amendment was filed with the Commission and was approved on May 19, 2003 (Decision No. 66052). Qwest refused payment arguing that Pac-West was not entitled to compensation for locally dialed calls delivered to a modem outside the local calling area where the call had originated. Although "VNXX" is not a legally cognizable subset of §251(b)(5) or ISP-bound traffic, for purposes of this case, we refer to this traffic as "VNXX traffic."

On June 29, 2006, the Commission issued Decision No. 68820 ("Decision") requiring Qwest to pay reciprocal compensation to Pac-West for all ISP-bound traffic, including VNXX

¹⁸ Order at 12 (The District Court relied upon certain quotations in *Verizon v. Peevey*, 462 F.3d 1142, 1146 (9th Cir. 2006) from the 1996 *Local Competition Order*, 11 FCC Rcd at 16013, ¶¶1033, 1034 (the "*Local Competition Order*") regarding "local" calls. However, "local" call analysis in the *Local Competition Order* was subsequently rejected by the FCC in the *ISP Remand Order* and the *ISP Mandamus Order*.)

¹⁹ Internet Service Provider ("ISP") Bound Traffic Amendment to the Interconnection Agreement between Qwest Corporation and Pac-West Telecom, Inc. for the State of Arizona (dated May 24, 2002). The ISP Amendment is attached to the Formal Complaint to Enforce Interconnection Agreement (Docket Nos. T-01051B-05-0495 and T-03693A-05-0495) and attached here as Exhibit 1.

traffic.²⁰ In the Decision, the Commission concluded that the “plain language of the ISP Amendment provides for reciprocal compensation for all ISP-bound traffic. Because it does not exclude VNXX ISP-bound traffic, we find that such traffic should be subject to reciprocal compensation under the terms of the ICA and ISP Amendment.”²¹ Qwest paid the amount due Pac-West under the Decision and sought review of the Decision in federal district court. Qwest maintains a “clawback” claim for repayment of the approximately \$1M payment to Pac-West.

In its appeal to the district court, Qwest challenged Decision No. 68820, asserting that the calls in question were “non-local ISP traffic” or “long distance calls” and therefore not compensable.²² Qwest further alleged that the Commission violated section 251(g) of the Telecommunications Act by applying the compensation regime applicable to telecommunications traffic instead of the access charge regime which governs long distance calls under section 251(g).²³ According to Qwest, the traffic in question was compensable as section 215(g) traffic. In response, Pac-West argued that the parties’ ICA required Qwest to pay Pac-West the FCC ordered rate for all 251(b)(5) traffic, with no qualifications, and that under the Act, the VNXX traffic was “telecommunications” traffic subject to section 251(b)(5) of the Act and thus subject to compensation under the parties’ ICA and the ISP Amendment.²⁴

On March 6, 2008, the district court issued its order reversing the Decision and remanding the case to the Commission for a determination of whether “VNXX traffic was

²⁰ *In the Matter of Pac-West Telecom, Inc. vs. Qwest Corporation*, Docket Nos. T-01051B-05-0495 and T-03693A-05-0495, (June 29, 2006), Decision No 28820.

²¹ Decision ¶ 26.

²² Qwest Complaint ¶¶ 41, 44, 53 and 54.

²³ Qwest Complaint ¶¶ 38 and 41.

²⁴ Opening Brief of Pac-West pp. 13-15.

among the calls subject to such reciprocal payments” before the issuance of the *ISP Mandamus Order*.²⁵ When the district court entered its order in March 2008, the FCC’s position on the correct categorization of ISP-bound traffic could be derived by reading and harmonizing the FCC *ISP Remand Order* and the opinion of the D.C. Circuit Court of Appeals in *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*WorldCom*”). But all parties to this dispute were also aware that by November 5, 2008, the FCC would issue a new order on ISP-bound traffic in response to a mandamus order from the D.C. Circuit Court of Appeals.²⁶ The FCC issued that order on November 5, 2008, finally clarifying the law articulated in the *ISP Remand Order*.²⁷

During this same period, Level 3 Communications was also in litigation with Qwest over the ISP Amendment to its ICA. The district court heard argument and issued rulings in the Pac-West and Level 3 cases simultaneously. Level 3 appealed the district court’s order to the Ninth Circuit Court of Appeals. That appeal was heard by the Ninth Circuit on November 4, 2009 and in March 2010 the appeal was dismissed “as being from a non-final order” of the district court. This dismissal, instead of bringing this five-year-old case to finality, brought all parties back before the Commission to act on Qwest’s claim for relief.

III. VNXX ISP-bound traffic is (and was) subject to reciprocal compensation under Section 251(b)(5).

The central question presented to the Commission in this case was “Whether VNXX ISP-Bound traffic is eligible for reciprocal compensation under the [Pac-West] ICA, as amended by the ISP Amendment.”²⁸ The signed “rate election” found in the ISP Amendment provides that

²⁵ Order at 20.

²⁶ *In re Core Communications, Inc.*, No. 07-1446, 2008 WL 2649636, at *1, *11 (D.C. Cir. July 8, 2008).

²⁷ *ISP Mandamus Order* ¶¶ 8 and 16.

²⁸ Order at 8.

“the reciprocal compensation rate elected for (251(b)(5)) traffic is . . . [t]he rate applied to ISP traffic.”²⁹ The ISP Amendment also provided that “Qwest elects to exchange ISP-Bound traffic at the FCC ordered rates pursuant to the [*ISP Remand Order*].”³⁰ Under each of these provisions, the outcome is the same: the traffic in question is section 251(b)(5) traffic subject to the rate applied to ISP-bound traffic, and the traffic is ISP-bound traffic to be exchanged at the FCC *ISP Remand Order* rates.

The district court, looking exclusively at section 3 of the ISP Amendment, held that it “could not conclude that the FCC intended to include VNXX traffic within the definition of the term ‘ISP-bound traffic’ in the *ISP Remand Order*” and remanded the case for a determination of whether “VNXX traffic was among the calls subject to such reciprocal payments” before the issuance of the *ISP Remand Order*.³¹ As discussed below, a number of the district court’s underlying presumptions regarding the nature of 251(b)(5) traffic would be, within a year, unequivocally rejected by the FCC.

Eight months after the district court issued its order, the FCC released its order justifying the intercarrier compensation scheme for ISP-bound traffic.³² The *ISP Mandamus Order*, like prior FCC orders, has the full force and effect of federal law and must be followed by the Commission. See *AT&T Commc’ns, Inc. v. Qwest Corp.*, No. 206CV00783 DS, 2007 WL 518537, *4 n.5 (D. Utah Feb. 13, 2007) (“As Qwest observes, [the Tenth Circuit] recognized the primacy of federal law, even where there is a role for state law: ‘The [state corporation commission] has an obligation to interpret the Agreement within the bounds of existing federal

²⁹ Exhibit 1, p. 3.

³⁰ Exhibit 1, p. 2, section 3.

³¹ Order at 20.

³² *ISP Mandamus Order*.

law.”); see also *Sw. Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493, 499 (10th Cir. 2000); *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 482 (5th Cir. 2000); *AT&T Commc'ns of Cal., Inc. v. Pac. Bell*, No. C 97-0080 SI, 1998 WL 246652, *14 (N.D. Cal. May 11, 1998) (“The FCC is empowered to announce its ruling by order rather than codified regulation, and its orders have full force and effect of law.”), *aff'd*, 203 F.3d 1183 (9th Cir. 2000).

The *ISP Mandamus Order* expressly states that section 251(b)(5) is not limited to “local” traffic and that all ISP-bound traffic falls within the scope of section 251(b)(5).³³ As the FCC explained in the *ISP Mandamus Order*, section 251(b)(5) is the overarching compensation obligation applicable to all telecommunications including ISP-bound traffic:

8. We begin by looking at the text of the statute. Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” The Act broadly defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Its scope is not limited geographically (“local,” “intrastate,” or “interstate”) or to particular services (“telephone exchange service,” “telephone toll service,” or “exchange access”). We find that the traffic we elect to bring within this framework fits squarely within the meaning of “telecommunications.” We also observe that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term “telecommunications,” the broadest of the statute’s defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.³⁴

³³ *ISP Mandamus Order* ¶¶ 8 and 16. Carriers remain able, as a contractual matter, to agree upon intercarrier compensation arrangements governed by tariff that differ from the \$0.0007 FCC rate found in the *ISP Remand Order*. That, however, was not the path taken by Qwest and Pac-West.

³⁴ *Id.* ¶ 8 (footnotes omitted).

Throughout this litigation, Qwest has argued that compensation between Qwest and Pac-West “is based on the geographic location of the two ends of the call”³⁵ and that “the FCC’s reciprocal compensation rules continue to apply only to local traffic”³⁶ As we now know, these assertions are contrary to what the FCC intended in the *ISP Remand Order* as further articulated in the *ISP Mandamus Order*: “we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.”³⁷ As the FCC further explained, compensation obligations between carriers under section 251(b)(5) are not limited geographically, or to particular services.³⁸

Qwest also argued to the district court that Pac-West “ignor[ed] the FCC’s determination that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5) of the Act.”³⁹ Qwest’s primary argument – that ISP-bound traffic cannot be subject to reciprocal compensation under section 251(b)(5) – was also squarely rejected by the FCC in the *ISP Mandamus Order*. Indeed, the *ISP Mandamus Order* is fatal to Qwest’s contention that compensation cannot be paid because ISP-bound traffic and section 251(b)(5) traffic are distinct traffic types. The following excerpt from the Qwest Reply submitted to the district court aptly illustrates the disparity between Qwest’s argument and the FCC *ISP Mandamus Order*:

The Commission and Pac-West further argue that the Pac-West [ISP Amendment] does not expressly exclude VNXX traffic. This argument erroneously presupposes that VNXX traffic was included in the first instance. Since the scope of traffic compensable by the ISP Amendments is tied to what is compensable under the *ISP Remand Order*,

³⁵ Qwest Corporation’s Answer to Pac-West Telecom’s Complaint to Enforce its Interconnection Agreement, and Counterclaims, p. 10 (August 22, 2005).

³⁶ Qwest Corporation’s Reply Brief p. 14 (March 15, 2007) (“*Qwest Reply*”).

³⁷ *ISP Mandamus Order* ¶ 8.

³⁸ *Id.*

³⁹ Qwest Reply p. 25.

their argument is really just the argument refuted above that the *ISP Remand Order* prescribed intercarrier compensation for all ISP Traffic including calls delivered to an ISP located outside the caller's LCA. Since the *ISP Remand Order* does not require compensation for calls outside the caller's LCA, neither do the ISP Amendments.⁴⁰

Qwest's underlying lynchpin presumption – that the “ISP Remand Order does not require compensation for calls outside the caller's ICA” – was not a valid legal interpretation of the *ISP Remand Order*. The FCC announced unequivocally in the *ISP Mandamus Order* that the reciprocal compensation obligations in section 251(b)(5) apply not just to “local” traffic but to all telecommunications traffic exchanged between local exchange carriers (“LECs”), unless excluded by section 251(g).⁴¹ Qwest's argument and the district court decision relying on those arguments are not sustainable.

The *ISP Mandamus Order* also included guidance about the correct categorization of ISP-bound traffic that was only implied in the *ISP Remand Order*: “As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).”⁴² Pac-West and Level 3 asserted repeatedly during this litigation that ISP-bound traffic fell within the scope of section 251(b)(5).⁴³ Now that argument is supported by citation to specific language in an FCC order: ISP-bound traffic is section 251(b)(5) traffic.⁴⁴ The parties agree that the traffic at issue in the

⁴⁰ Qwest Reply p. 25.

⁴¹ *ISP Mandamus Order* ¶¶ 9-16.

⁴² *ISP Mandamus Order* ¶ 16.

⁴³ See Pac-West Opening Brief of Pac-West Telecom, pp. 12-15 (January 31, 2007) (Arizona District Court No. CV 06-02130-PHX-SRB); Reply Brief of Pac-West Telecom, pp. 19-20 (3-15-07) (Arizona Dist. Court No. CV 06-02130-PHX-SRB); Response Brief in Support of Formal Complaint to Enforce Interconnection Agreement, pp 12-15 (Docket Nos. T-01051B-05-0495; T-03693A-05-0495) (October 19, 2005).

⁴⁴ *ISP Mandamus Order* ¶ 16.

ISP Amendment to the parties' ICA was ISP-bound traffic.⁴⁵ Pursuant to the FCC order, ISP-bound traffic is section 251(b)(5) traffic – no matter where it travels. In this case, the ISP Amendment directs a specific level of compensation for section 251(b)(5) traffic and Pac-West is entitled to that compensation.

a. VNXX Traffic is Not Excluded from Section 251(b) by Section 251(g).

Qwest has argued that VNXX traffic is not “ISP-bound traffic” as that term is used in the *ISP Remand Order* and the *ISP Mandamus Order*, even though the traffic is transported to an ISP. To reach this conclusion, the FCC has now made clear that Qwest must prove that VNXX traffic is 251(g) traffic. In the *ISP Mandamus Order*, the FCC reiterated that “the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing ‘exchange access, information access, and exchange services for such access’ provided to interexchange carriers and information service providers until ‘explicitly superseded by regulations prescribed by the Commission.’”⁴⁶ In other words, the *only* compensation scheme that exists apart from section 251(b)(5) is the section 251(g) compensation mechanism. If – as Pac-West contends – this is section 251(b)(5) traffic, then it is compensable under the ISP Amendment. To prevail as a matter of law in this case, Qwest can only argue that this ISP-bound traffic is section 251(g) traffic. However, that argument has been rejected both by the D.C. Circuit Court of Appeals in *WorldCom* and by the FCC, and is inconsistent with the text of the 1996 Act itself.

⁴⁵ Qwest Complaint ¶¶ 3, 41, 44, 53 and 54 (“calls placed to ISPs”); Qwest Corporation’s Reply Brief, p. 1 (3-15-07) (Arizona Dist. Court No. CV 06-02130-PHX-SRB).

⁴⁶ *ISP Mandamus Order*, ¶ 9 (footnote omitted).

1. *WorldCom, Inc. v. F.C.C.*

In 2002, the D.C. Circuit Court of Appeals held unambiguously that section 251(g) *does not apply* to ISP-bound traffic exchanged between LECs – and thus that calls made to an ISP are not toll calls. *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432 (D.C. 2002). This holding was based upon the understanding that, both prior to and following passage of the Act, WorldCom exchanged such traffic with other LECs as local, not toll, traffic, without regard to the physical location of either of the parties to the call. The pre-Act treatment of this traffic dictates the compensation obligations of the carriers even after the enactment of the Act. In *WorldCom*, the D.C. Circuit explained that section 251(g) authorized only the “continued enforcement” of pre-Act requirements, namely those traffic exchange compensation arrangements (such as access) that existed as of February 8, 1996. *Id.* The D.C. Circuit concluded that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.” *Id.* at 433 (emphasis in original). The Ninth Circuit has recognized that, as a direct consequence of this holding, the compensation obligation arising under section 251(g) cannot apply to ISP-bound traffic. *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1131 (9th Cir. 2003) (noting that the D.C. Circuit’s *WorldCom* decision “defeats” the argument that ISP-bound traffic may be excluded from the section 251(b)(5) intercarrier compensation obligation pursuant to section 251(g)). In other words, Qwest’s contention that VNXX ISP-bound traffic is section 251(g) traffic is contrary to binding precedent announced by the D.C. Circuit in *WorldCom*.

2. *ISP Mandamus Order*

In the *ISP Mandamus Order*, the FCC repeated the D.C. Circuit’s 2002 holding, that ISP-bound traffic does “not fall within the section 251(g) carve out from section 251(b)(5) as ‘there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.’”⁴⁷

⁴⁷ *ISP Mandamus Order*, ¶ 16.

3. The History and Breadth of Section 251(g)

Qwest alleges that the calls at issue here are not ISP-bound calls – as that term is used in *WorldCom* – and therefore must be compensated under section 251(g). To prove its case, Qwest must meet the qualification criteria for intercarrier compensation set forth in section 251(g) and explained in *WorldCom*.⁴⁸ First, Qwest would have to demonstrate that there was a “pre-Act obligation relating to intercarrier compensation” for this traffic (the locally-dialed ISP-bound traffic routed outside the local calling area). It cannot meet this hurdle, however, because no pre-Act obligation existed for ISP-bound traffic generally. *Id.* at 433. It naturally follows then, that no pre-Act obligation could exist for a sub-set of ISP-bound traffic. As a practical matter, because CLECs did not exist “pre-Act,” they could not have served ISP customers, and could not have been subject to a pre-Act compensation obligation for this traffic.

Qwest’s argument for §251(g) compensation also fails because the 1996 Act created an outright prohibition against extending access charges by analogy. Section 251(g) allows only the “[c]ontinued enforcement” of certain pre-Act obligations. The FCC intended §251(g) to operate as a “transitional device” that would preserve – but not expand – “LEC duties that antedated the 1996 Act.”⁴⁹ The FCC could not, as Qwest contends, choose to extend this narrow, temporary exemption to a wholly new type of traffic by analogy. *WorldCom* responded to the FCC’s attempt to distort 251(g) as follows:

But nothing in §251(g) seems to invite the Commission’s reading, under which (it seems) it could override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to the LEC’s pre-Act obligations.⁵⁰

⁴⁸ *WorldCom*, 288 F.3d at 432-34.

⁴⁹ *WorldCom*, 288 F.3d at 430.

⁵⁰ *WorldCom*, 288 F.3d at 433.

Internet bound traffic was not subject to access charges prior to the 1996 Act and cannot today be categorized at 251(g) traffic.

Qwest has argued that ISP-bound VNXX traffic is “like interstate FX services [and thus] subject to the FCC’s access charge regime.”⁵¹ For a number of reasons, this assertion is incorrect. First, as discussed above, the FCC cannot, by analogy, extend §251(g) compensation to traffic types that were not the subject of a rule, regulation or order prior to the 1996 Act. Further, FX interstate traffic in early 1996 was not functionally “like” VNXX ISP-bound traffic. FX services were typically purchased by a business for purposes of creating a local voice presence in a distant office. For example, a Phoenix business might purchase FX service for its branch office in Reno, thereby allowing local dialing between the two offices. These lines would be used heavily for voice-traffic and customer convenience. In contrast, VNXX ISP-bound traffic is the one-way, non-voice transport of digital packets destined for the Internet. This traffic is drastically different in volume and type. User expectations regarding the service are very different. An end-user of an ISP dial-up service does not care where the ISP is located or where the call is terminated, rather quick access to MapQuest, Google or Face Book is the priority. In contrast, the FX service customer intends (and has intentionally arranged) to reach out, via a local presence, to a specific pre-arranged distant location.

Although Qwest tries to argue that post-Act VNXX services are “like” pre-Act FX services, the services are different in ways that the FCC and the D.C. Circuit have found to be legally significant: Qwest’s FX service existed prior to the Act, Pac-West’s ISP-bound VNXX service did not; Qwest’s FX service was offered typically to a business to provide traditional calling, Pac-West’s VNXX service is offered to ISPs to provide ISP-bound service (which the

⁵¹ Qwest Corporation’s Response to The Motion for Summary Determination of Pac-West Telecomm Inc. at 15.

D.C. Circuit has found cannot be subject to section 251(g)); and in order to fit within section 251(g), Qwest's FX service must have been offered by a LEC "to an interexchange carrier," whereas Pac-West's ISP-bound VNXX service is a LEC-to-LEC service. Qwest's argument – that post-Act VNXX services are "like" pre-Act FX services falls far short of the section 251(g) criteria for compensation under 251(g).

Finally, section 251(g) also requires that the traffic must have been subject to "equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996." As stated above, ISP-bound traffic between LECs did not exist prior to the 1996 Act, and could not have been subject to interconnection restrictions and obligations applicable the day after enactment of the Act. Given the legal qualification criteria contained in 251(g), the Commission must reject Qwest's assertion this traffic qualifies for compensation under section 251(g).

b. The Pac-West/Qwest ICA as Amended.

In May of 2002 – the same month the D.C. Court of Appeals issued its decision in *WorldCom* – Qwest prepared the ISP Amendment. Three months later, in August of 2002, Pac-West signed the ISP Amendment. Qwest signed the ISP Amendment six months later in February of 2003. By February of 2003, Qwest and Pac-West were well aware that the D.C. Circuit had rejected the FCC's claim that it was authorized to create a plan for ISP-bound traffic under section 251(g). The D.C. Circuit had construed narrowly the services that could fall within the framework of section 251(g). ISP-bound traffic was not, and could not be, section 251(g) traffic. When it signed the ISP Amendment, Qwest was well aware that locally dialed ISP-bound traffic was interstate in nature, but could not be subject to the section 251(g) compensation scheme.

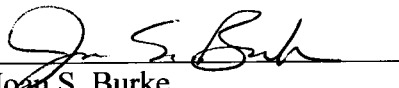
Industry practice and the parties' course of dealing under the ICA further support Pac-West's position that all ISP-bound traffic was subject to the ISP Amendment. The rates contained in the ISP Amendment were effective beginning June 14, 2001. Qwest first notified interconnecting carriers of its position that VNXX traffic was not "local" or "ISP-bound" traffic on January 25, 2005, and first began to withhold compensation for what Qwest considered VNXX traffic at that same time. Accounting records show that Qwest paid Pac-West reciprocal compensation for all ISP-bound traffic for over three years before articulating the VNXX basis for non-payment. These facts provide strong evidence that Qwest's revised understanding of the ICA does not reflect the parties' intent at the time of contracting. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 681 P.2d 390 (App. 1983) (contract interpretation reflected in the conduct of the parties before any controversy as to meaning arises will be enforced if reasonable).

IV. Conclusion.

Once the ISP Amendment was signed by Qwest and Pac-West, the only viable dispute was whether ISP-bound traffic (including this VNXX traffic) was section 251(b)(5) traffic. If the VNXX traffic at issue in this dispute is section 251(b)(5) traffic, under the ICA and the ISP Amendment, it is compensated at the agreed upon rate of \$0.0007. Qwest argues that VNXX traffic is interstate 251(g) traffic and, thus, subject to access charges. This argument is not supported by the *ISP Mandamus Order*, the *ISP Remand Order*, or the Telecommunications Act. Furthermore, Qwest's contention that this VNXX traffic is section 251(g) traffic is directly contradicted by the D.C. Circuit Court's holding that ISP-bound traffic cannot be section 251(g) traffic. To accept Qwest's argument, one would have to conclude that the FCC has recognized a separate sub-category of ISP-bound traffic, which was not at issue in *WorldCom*, and which existed before the Telecommunications Act. Qwest offers no FCC Order citation or case law to

support this theory, nor any account of a LEC offering VNXX ISP-bound traffic prior to the Act. In sum, like the overlapping Venn diagrams from second-grade, all ISP-bound traffic is section 251(b)(5) traffic, and the parties agree that all the VNXX traffic at issue in this case is ISP-bound traffic. Therefore, the VNXX traffic at issue in this case is section 251(b)(5) traffic and subject to reciprocal compensation under the ISP Amendment.

RESPECTFULLY SUBMITTED this 1st day of October 2010.

By 
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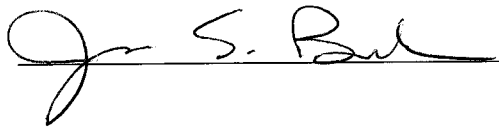
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A handwritten signature in black ink, appearing to read "J. S. Bul", written over a horizontal line.

4829-9564-5703, v. 1

Exhibit 1

**Internet Service Provider ("ISP") Bound Traffic Amendment
to the Interconnection Agreement between
Qwest Corporation and
Pac-West Telecomm, Inc.
for the State of Arizona**

This is an Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest"), formerly known as U S WEST Communications, Inc., a Colorado corporation, and Pac-West Telecomm, Inc. ("CLEC"). CLEC and Qwest shall be known jointly as the "Parties".

RECITALS

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("Agreement") which was approved by the Arizona Corporation Commission ("Commission") on December 14, 1999; and

WHEREAS, The FCC issued an Order on Remand and Report and Order in CC Docket 99-68 (Inter-carrier Compensation for ISP-Bound Traffic); and

WHEREAS, the Parties wish to amend the Agreement to reflect the aforementioned Order under the terms and conditions contained herein.

WHEREAS, the Parties wish to amend the Agreement to add a Change of Law provision.

AGREEMENT

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to the language as follows in lieu of existing contract language:

1. Definitions

For purposes of this Amendment the following definitions apply:

- 1.1 "Bill and Keep" is as defined in the FCC's Order on Remand and Report and Order in CC Docket 99-68 (Inter-carrier Compensation for ISP-Bound Traffic). Bill and Keep is an arrangement where neither of two (2) interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Bill and Keep does not, however, preclude inter-carrier charges for transport of traffic between carriers' networks.

- 1.2 "Information Service" is as defined in the Telecommunications Act of 1996 and FCC Order on Remand and Report and Order in CC Docket 99-68 and includes ISP-bound traffic.
- 1.3 "Information Services Access" means the offering of access to Information Services Providers.
- 1.4 "ISP-Bound" is as described by the FCC in its Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68.

2. Exchange Service (EAS/Local) Traffic

Pursuant to the election in Section 5 of this Amendment, the Parties agree to exchange all EAS/Local (§251(b)(5)) traffic at the state ordered reciprocal compensation rate.

3. ISP-Bound Traffic

3.1 Qwest elects to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC's Order on Remand and Report and Order (Intercarrier Compensation for ISP-Bound Traffic) CC Docket 99-68 (FCC ISP Order), effective June 14, 2001, and usage based intercarrier compensation will be applied as follows:

3.2 Compensation for presumed ISP-bound traffic exchanged pursuant to Interconnection agreements as of adoption of the FCC ISP Order, April 18, 2001:

3.2.1 Identification of ISP-Bound traffic – Qwest will presume traffic delivered to CLEC that exceeds a 3:1 ratio of terminating (Qwest to CLEC) to originating (CLEC to Qwest) traffic is ISP-bound traffic. The Parties agree that the "3:1 ratio of terminating to originating traffic", as described in Paragraph 79 of the FCC ISP Order, will be implemented with no modifications.

3.2.2 Growth Ceilings for ISP-Bound Traffic – Intercarrier compensation for ISP-bound traffic originated by Qwest end users and terminated by CLEC will be subject to growth ceilings. ISP-bound MOUs exceeding the growth ceiling will be subject to Bill and Keep compensation.

3.2.2.1 For the year 2001, CLEC may receive compensation, pursuant to a particular Interconnection Agreement for ISP bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP bound minutes for which CLEC was entitled to compensation under that Agreement during the first quarter of 2001, plus a ten percent (10%) growth factor.

3.2.2.2 For 2002, CLEC may receive compensation, pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that Agreement in 2001, plus another ten percent (10%) growth factor.

3.2.2.3 In 2003, CLEC may receive compensation, pursuant to a particular Interconnection Agreement, for ISP bound minutes up to a ceiling

equal to the 2002 ceiling applicable to that Agreement.

3.2.3 Rate Caps -- Inter-carrier compensation for ISP-bound traffic exchanged between Qwest and CLEC will be billed in accordance with their existing Agreement or as follows, whichever rate is lower:

3.2.3.1 \$.0015 per MOU for six (6) months from June 14, 2001 through December 13, 2001.

3.2.3.2 \$.001 per MOU for eighteen (18) months from December 14, 2001 through June 13, 2003.

3.2.3.3 \$.0007 per MOU from June 14, 2003 until thirty six (36) months after the effective date or until further FCC action on inter-carrier compensation, whichever is later.

3.2.3.4 Compensation for ISP bound traffic in Interconnection configurations not exchanging traffic pursuant to Interconnection agreements prior to adoption of the FCC ISP Order on April 18, 2001 will be on a Bill and Keep basis until further FCC action on Inter-carrier compensation. This includes carrier expansion into a market it previously had not served.

4. Effective Date

This Amendment shall be deemed effective upon approval by the Commission; however, Qwest will adopt the rate-affecting provisions for both ISP bound traffic and (§251(b)(5)) of the Order as of June 14, 2001, the effective date of the Order.

5. Rate Election

The reciprocal compensation rate elected for (§251(b)(5)) traffic is (elect and sign one):

Current rate for voice traffic in the existing Interconnection Agreement:

Signature

Name Printed/Typed

OR

The rate applied to ISP traffic:

Signature

JOHN SUMPTER
Name Printed/Typed

6. Change of Law

The provisions in this Agreement are based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the Existing Rules). Among the Existing Rules are the results of arbitrated decisions by the Commission which are currently being challenged by Qwest or CLEC. Among the Existing Rules are certain FCC rules and orders that are the subject of, or affected by, the opinion issued by the Supreme Court of the United States in AT&T Corp., et al. v. Iowa Utilities Board, et al. on January 25, 1999. Many of the Existing Rules, including rules concerning which network elements are subject to unbundling requirements, may be changed or modified during legal proceedings that follow the Supreme Court opinion. Among the Existing Rules are the FCC's orders regarding BOCs' applications under Section 271 of the Act. Qwest is basing the offerings in this Agreement on the Existing Rules, including the FCC's orders on BOC 271 applications. Nothing in this Agreement shall be deemed an admission by Qwest concerning the interpretation or effect of the Existing Rules or an admission by Qwest that the Existing Rules should not be vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, dismissed, stayed or modified. To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. This Section shall be considered part of the rates, terms and conditions of each Interconnection, service and network element arrangement contained in this Agreement, and this Section shall be considered legitimately related to the purchase of each Interconnection, service and network element arrangement contained in this Agreement.

7. Further Amendments

Except as modified herein, the provisions of the Agreement shall remain in full force and effect. Neither the Agreement nor this Amendment may be further amended or altered except by written instrument executed by an authorized representative of both Parties. This Amendment shall constitute the entire Agreement between the Parties, and supercedes all previous Agreements and Amendments entered into between the Parties with respect to the subject matter of this Amendment.

The Parties understand and agree that this Amendment will be filed with the Commission for approval. In the event the Commission rejects any portion of this Amendment, renders it inoperable or creates an ambiguity that requires further amendment, the Parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification.